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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CORDIARE DESHAWN MCDONALD,

Defendant and Appellant.

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In re CORDIARE DESHAWN  
MCDONALD

on Habeas Corpus.

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G040058

(Super. Ct. No. 06CF4055)

O P I N I O N

G041075

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier, Judge. Affirmed.

Original proceeding; petition for a writ of habeas corpus, after judgment of the Superior Court of Orange County. Petition granted and case remanded.

Kurt David Hermansen, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Cordiare Deshawn McDonald of two counts of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c); all further statutory references are to the Penal Code unless otherwise specified) and found true a firearm enhancement for each count (§ 12022.53, subd. (b)). Defendant was sentenced to a total of 13 years in prison, consisting of two concurrent sentences of 3 years for the robberies and two consecutive 10-year terms for the gun enhancements.

Defendant appeals on four grounds, all going to the firearm enhancement true findings: trial counsel was ineffective for failing to object to certain photographs he claims were prejudicial; there was insufficient evidence that he used a firearm during the robberies; the court allowed an improper hypothetical question to be posed to and answered by an expert witness; and improper expert opinion should not have been admitted. Defendant also petitions for habeas corpus claiming ineffective assistance of counsel for failing to investigate a defense and for failing to call a witness.

After consolidating the appeal with the petition for all purposes, we affirm the judgment but conclude defendant has made out a prima facie case of ineffective assistance of counsel sufficient to have a hearing. We remand the case to the superior court to issue an order to show cause and hold an evidentiary hearing to determine the issue of ineffective assistance of counsel.

## FACTS

At about 2:30 a.m. Jae Keun Jung, a cashier at a convenience store, saw a man he did not know, wearing a bandana covering his face, enter the store. The man, who was later identified as defendant, pointed “some kind of weapon” at him and demanded money. Jung gave him the contents of the cash drawer. The incident was captured on the store’s video camera.

One afternoon about a week later, Michael Phan, working in a video store, saw a young African-American man enter, walk around for a few minutes, and depart. After the other customers left, the man, whom Phan later identified from a lineup as defendant, returned, and went to the counter where Phan was standing, telling him he wanted to buy a video. When Phan turned to get it defendant took a gun from his pocket, pointed it at Phan, and demanded money; he then put the gun back in his pocket. After Phan gave him what was in the cash drawer defendant demanded more and came around the counter. When he saw a surveillance camera he left.

When police arrived Phan told Officer Bailey the gun was black and looked like Bailey’s semiautomatic revolver. At trial Phan testified the gun was approximately eight inches long. Although he did not know if the gun was real, he was scared enough to give defendant the money.

Officer Raymond Winick went to defendant’s residence and defendant’s mother gave him a digital camera that belonged to defendant. The camera contained several pictures of a semiautomatic gun, some of which showed defendant holding it. He did not find a gun.

On cross-examination, when defense counsel showed him one of the pictures from the camera (defendant’s Exhibit A), Winick testified that although the gun appeared to be a semiautomatic handgun he could not tell whether it was a real gun, a pellet gun, a replica, or some other type of gun because he had never seen the actual gun.

On redirect the prosecution presented him with four more photographs from defendant's camera: They showed defendant holding a gun to his head (Exhibit 9), defendant smiling while holding a gun close to his head (Exhibit 10), defendant pointing a gun (Exhibit 11), and a black handgun in the background while in front of it is an unidentified hand making the shape of a "W" (Exhibit 13). Winick could not tell if the gun in Exhibits 9 and 11 were real. Exhibit 10 was a compact type semiautomatic gun but he could not say whether it was a real firearm.

Defendant called Jimmy Trahin, a firearms expert. He testified as to the differences between firearms and BB/pellet guns. Defense counsel showed him three pictures taken from the camera and he identified the gun in them as a Gamo PT-80 pellet gun, commonly sold at sports stores. He also testified that there were no differences between the gun in those pictures and that in defendant's Exhibit A.

On cross-examination Trahin testified the gun in Exhibit 9 looked like a semiautomatic firearm. As to the gun in exhibits 11 and 13 he could not determine if it was a Gamo PT-80 pellet gun, a firearm, or an air pistol. The gun in Exhibit 10 could not be a real firearm.

Trahin was also shown the convenience store video. He testified the length of the gun was seven-to-eight inches. He could not determine whether the gun was a Gamo PT-80 pellet gun or a "related firearm similar to the PT-80." It could be one of "dozens and dozens of models."

## DISCUSSION

### *1. Appeal*

#### *a. Ineffective Assistance of Counsel*

In addition to the two grounds for his claim of ineffective assistance of counsel in the writ petition discussed below, defendant argues his lawyer erred by failing

to object to the prosecution's introduction of four photographs (Exhibits 9, 10, 11, and 13) taken from defendant's digital camera.

During rebuttal argument the prosecutor argued there was no evidence as to when the pictures were taken, but the photographs did show that defendant, "who chose to bring a semiautomatic to commit two robberies, is someone that is proud to be photographed with guns. He took these pictures of himself. . . . [¶] If I go to any of your homes today, I'll see photographs of your children, of your graduation, of mementos that . . . you are proud of. These are the mementos that the defendant . . . [is] proud of. He is someone that likes guns and takes photographs of himself with guns. [¶] And the defense wants you to believe it is so unreasonable . . . to reject the People's evidence. That with all the other evidence you have . . . it is so unreasonable that when he commits robberies he's not going to use a real firearm[.] [¶] This is the defendant right here. Now, I ask you to use your common sense and determine what is reasonable."

Defendant asserts the only probative value of the pictures was to improperly cast him in an unfavorable light and the pictures were so prejudicial and inflammatory that had counsel objected they would have been excluded under Evidence Code section 352. Specifically he argues that exhibits 9, 10, and 11 were used solely to raise the inference that because defendant enjoyed photographing himself with guns, he was a "bad" person and must have used a real gun during the robberies. He maintains the prosecution would have been unable to explain how the pictures had any tendency to show defendant used a gun during the robberies and thus could not have avoided their exclusion.

As to exhibit 13, the photo showing the "W" with the gun, defendant argues it was inadmissible because there were no gang charges against him and it was introduced, again, only to show his bad character, "a gang member who was obsessed with guns." Evidence of gang membership is inadmissible "where its sole relevance is to

show a defendant's criminal disposition or bad character" to raise the inference he committed the charged crime. (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.)

Defendant contends he was prejudiced by admission of the photographs and it is reasonably probable the result would have been more favorable to him had they been excluded. They would not have been discussed in closing argument to show he liked guns nor would they have bolstered the prosecution's lack of substantial evidence a firearm was used in robberies.

The standard for determining ineffective assistance of counsel is well settled. To prevail, a defendant must show that, viewing it objectively, counsel's performance fell below prevailing professional standards and was prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) To prove prejudice, defendant must demonstrate there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218 .) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." [Citations.] (*People v. Weaver* (2001) 26 Cal.4th 876, 925.)

"If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim [of ineffective assistance of counsel] on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding . [Citations.]" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) There is nothing in the record to show why trial counsel did not object to introduction of the photographs nor that she was asked to explain her reasons.

Defendant argues that there is no good reason why counsel would not have objected. The Attorney General counters that there was a tactical reason defense counsel did not object to admission, i.e., because she used some pictures from the digital camera

to support the defense defendant used a BB gun. But counsel did not use those four photos for that purpose.

The Attorney General also asserts that once the photographs were introduced, defendant's expert, Trahin, testified the gun in exhibit 10 was a BB gun and that he could not determine whether the weapon in exhibits 11 and 13 was also a BB gun. This, the argument continues, helped raise a reasonable doubt as to the type of gun used. But Trahin also testified he had not seen the four photographs before his testimony. And in cross-examination by the prosecutor, Trahin testified the gun in exhibit 9 looked like a semiautomatic firearm.

Deficiency in counsel's performance is a mixed question of fact and law. (*People v. Mayfield* (1993) 5 Cal.4th 142, 199.) “[W]e accord great deference to counsel's tactical decisions’ [citation], and we have explained that ‘courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight’ [citation]. ‘Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.’ [Citation.]” (*People v. Weaver, supra*, 26 Cal.4th at pp. 925-926.)

The record contains no evidence as to why counsel might have allowed the photographs into evidence without objection. But the Attorney General's arguments as to why this was a tactical decision are thin. Defendant did not need the photographs in question to elicit Trahin's testimony that the type of gun used was uncertain. Further, given the prosecutor's closing argument about defendant's affinity for guns and the less than overwhelming circumstantial evidence the gun was a firearm, admission of the photographs is a questionable tactic from the defense point of view. We cannot say as a matter of law this amounted to ineffective assistance of counsel, but because we are remanding the case for a hearing on that issue pursuant to the writ petition, defendant will not be precluded from raising this as an issue at that hearing.

*b. Sufficiency of the Evidence for Firearm Use Findings*

Defendant asserts the prosecution did not prove beyond a reasonable doubt that he used a real firearm in committing the robberies. We conclude the evidence was sufficient.

Where there is a claim of insufficient evidence, “we ‘examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) “Unless it is clearly shown that ‘on no hypothesis whatever is there sufficient substantial evidence to support the verdict’ the conviction will not be reversed. [Citation.]” (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162.) We apply the same standard to convictions based largely on circumstantial evidence. (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1745.)

A 10-year consecutive sentence is mandated when a defendant personally uses a firearm during commission of a robbery. (§ 12022.53, subd. (b).) For purposes of that statute, a firearm is defined as “any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of any explosion or other form of combustion.” (§ 12001, subd. (b).) A “BB device” is separately defined as “any instrument that expels a projectile, such as a BB or a pellet, not exceeding 6mm caliber, through the force of air pressure, gas pressure, or spring action, or any spot marker gun.” (§ 12001, subd. (g).) BB guns are thus not encompassed within the definition of a firearm for purposes of section 12022.53. (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435.) The jury was given CALCRIM No. 3146 that defines firearm in accordance with section 12001, subdivision (b).

In support of his argument there was insufficient evidence he used a firearm as defined, defendant relies on the facts that no witness testified the gun used was an actual firearm, he never fired the gun, police never found a firearm or bullets, and no gunshots were heard.

*People v. Monjaras, supra*, 164 Cal.App.4th 1432 disposes of defendant's claim. There, the defendant accosted a woman in a parking lot late one night demanding she hand over her purse. As he pulled up his shirt he showed her the handle of a black pistol in his waistband. At trial the victim testified she did not know whether the pistol was a toy or real. The court found the defendant personally used a firearm during commission of a robbery.

The appellate court rejected his argument the prosecution had not proven the firearm was real but that the conviction was based on conjecture. In so doing it stated that "[c]ircumstantial evidence alone is sufficient to support a finding that an object used by a robber was a firearm. [Citations.]" (*People v. Monjaras, supra*, 164 Cal.App.4th at p. 1436.) "This is so because when faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to closely examine the object; and in any event, victims often lack expertise to tell whether it is a real firearm or an imitation." (*Ibid.*) It held that "the victim's inability to say conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm. [Citation.]" (*Id.* at pp. 1437-1438, fn. omitted.) Rather, "when as here a defendant commits a robbery by displaying an object that looks like a gun, the object's appearance and the defendant's conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm within the meaning of section 12022.53, subdivision (b)." (*Id.* at p. 1437.)

Here, the evidence, viewed in the light most favorable to the prosecution, supports the conviction. Jung testified defendant had a weapon and demanded money. He gave it to him because he had a gun or a knife. The video footage, shown to the jury,

depicted a gun. Phan's testimony was the same, i.e., defendant, wearing a bandana covering his face, took a gun from his pants, pointed it at Phan, and told him to give him money. Phan did so because, when he saw the gun, he was afraid defendant would shoot him if he did not. Although neither witness could not say for sure if the gun was a real firearm, the weapon looked like a gun, and defendant used it to scare the victims into handing over money. This was enough for a reasonable inference defendant used a firearm. "[T]he jury was entitled to take defendant at his word, so to speak, and infer from his conduct that the pistol was a real, loaded firearm and that he was prepared to shoot the victim with it if she did not comply with his demand. [Citation.]" (*People v. Monjaras*, *supra*, 164 Cal.App.4th at p. 1437.)

That there might be contrary evidence, no matter how strong, does not change the finding. Thus, evidence suggesting the weapon used was a BB gun is a jury question. We do not reweigh evidence or redetermine issues of credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Likewise defendant's attempt to distinguish *Monjaras* is unsuccessful. It is completely irrelevant that the case was not decided in our district. Moreover, that the authority on which it relied, in part, *People v. Aranda* (1965) 63 Cal.2d 518, dealt with the definition of a deadly weapon as opposed to a firearm does not affect the basic principles laid out in *Monjares*.

### *c. Hypothetical Question*

During cross-examination defendant's expert, Trahin, was asked the following: "Assume that you got a call to a 7-Eleven store . . . as police officer, of an ongoing [robbery]. And assume that when you arrive you see a suspect wearing a . . . bandana on his face. And when you enter the store, he's got [the weapon shown in the surveillance video] in his hand and he turns and points that at you. Isn't it true that you would use lethal force?" After the court overruled defendant's objection Trahin

answered that he would. He stated that because the gun looked like a firearm, he would react as if it were to protect himself.

Defendant challenges this hypothetical as improper because “not ‘rooted in facts shown by the evidence,’” irrelevant, and prejudicial under Evidence Code section 352. He argues that although Trahin, a retired police detective, could not confirm whether the gun in the surveillance video was a firearm, this hypothetical implied he believed it was real and if he believed it was real, it must have been a firearm. Defendant claims this shored up the prosecution’s lack of credibility to that effect. We are not persuaded.

First, the record reflects the hypothetical paralleled the facts of the 7-Eleven robbery. Defendant does not explain his argument to the contrary. Second, the question was relevant. As discussed above, under *People v. Monjaras*, *supra*, 164 Cal.App.4th 1432, evidence that the gun looked like a firearm as defined in section 12001, subdivision (b) goes to the issue of whether the prosecution has proved a firearm enhancement under section 12022.53, subdivision (b). It is within the court’s discretion to allow this type of question (*People v. Thornton* (2007) 41 Cal.4th 391, 429) and we see no abuse of discretion here.

*d. Testimony Regarding Length of the Gun*

Over defendant’s objection Winick testified about the characteristics of the gun in the convenience store surveillance video shown to the jury. He stated he was “positive” the gun in the video was longer than the one in the photos from defendant’s camera, appearing to be full size or semiautomatic as opposed to the compact shown in Exhibit 10, one of the photos to which defendant argues his counsel should have objected.

Defendant contends this testimony should not have been admitted. He argues Winick had not been qualified as an expert. Further, he maintains the length of

the gun is not an opinion outside the common experience or competence of jurors (Evid. Code, § 801, subd. (a)) and was not a topic for which an expert was required or allowed (*People v. Cole* (1956) 47 Cal.2d 99, 103 [expert may testify only about subjects outside training, education, competence, or common experience of jurors]). He asserts he was prejudiced because a police officer's testimony he is "positive" will significantly sway the jury toward the prosecution's theory of the case, that defendant used a firearm and not a pellet or BB gun.

Admission of the testimony was not error. First, Winick was qualified to render the opinion. He had been a police officer for more than 13 years, had experience with firearms and other types of guns, and knew the difference between them. He testified about the characteristics of various types of semiautomatic weapons, full sized weapons such as Glocks and Berettas, airsoft guns, and smaller caliber guns. This is information beyond the normal experience and knowledge of jurors. Further, the guns were depicted on two different media, digital pictures that were grainy and the surveillance video. This complicated the identification of the guns, confirmed by Winick's testimony he could not tell if they were real. The testimony was of the type encompassed by Evidence Code section 801, subdivision (a).

## *2. Petition for Writ of Habeas Corpus*

Defendant raises two grounds for his ineffective assistance of counsel claim in this writ petition: that his lawyer failed to investigate evidence showing the weapon used was a BB gun and that she failed to call defendant's mother as a witness.

The standard of review for a claim of ineffective assistance of counsel is set out above. We repeat that "[r]eviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citations.]" (*People v. Weaver, supra*, 26 Cal.4th at pp. 925-

926.) However, “counsel’s alleged tactical decisions must be subjected to ‘meaningful scrutiny.’ [Citation.] Tactical decisions must be informed, so that before counsel acts, he or she “‘will make a rational and informed decision on strategy and tactics founded on adequate investigation an preparation.’” [Citations.]” (*In re Lucas* (2004) 33 Cal. 4th 682, 722.)

As part of the writ petition defendant filed the declaration of his friend, Billy Brent. Brent stated that the day before the convenience store robbery, defendant told him he wanted to buy a BB gun and he accompanied defendant to a sports equipment store for that purpose. On that day defendant bought a Gamo PT-80 BB gun; he left the box and receipt for purchase with Brent.

At some point defendant’s trial counsel asked Brent to bring the box with him to court. However she never asked to see the receipt nor did she question him about any details of the purchase. Brent appeared for trial twice, bringing the box and the gun. He was never called and counsel did not speak to him or obtain from him the receipt or the box.

It is not clear whether counsel knew Brent had a receipt. But according to Brent counsel never asked any of the specifics of the purchase. Had she spoken to him in more detail she might have learned of the receipt and that the gun was purchased the day before the first robbery. This would have lent credence to the defense that defendant used a BB gun during the robberies. Had she asked Brent where the gun was purchased she could have also interviewed the sales clerk at the sports equipment store to see if he or she remembered defendant and could testify about his purchase.

Had she looked at the box she would have seen it was exactly eight inches long. Phan testified the gun used at the video store was eight inches long. Trahin testified the gun in the convenience store surveillance tape was seven to eight inches long.

To satisfy the prevailing professional norms, defense “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.’ [Citation.]” (*In re Visciotti* (1996) 14 Cal.4th 325, 348.) “An attorney’s exercise of discretion in making tactical decisions regarding trial strategy must be both reasonable and informed. An informed decision is one made on the basis of reasonable investigation. [Citation.]” (*Ibid.*)

In light of the substantial conflict in the evidence as to the gun defendant used it appears it would have benefitted the defense for counsel to have spoken to Brent about the facts surrounding defendant’s purchase of the Gamo PT-80 BB gun. In looking at the gun in the surveillance video, Trahin testified it could be a Gamo PT-80.

We have no testimony or declaration of trial counsel to show why she did not talk to Brent about the receipt and the details of the purchase of the BB gun the day before the first robbery. But defendant has made a sufficient prima facie showing of facts, which could entitle him to habeas corpus relief. We therefore remand the case to the trial court to issue an order to show cause and hold an evidentiary hearing on the question of ineffective assistance of counsel raised in the petition.

As his second basis for ineffective assistance of counsel defendant argues counsel should have called his mother, Barbara Cunningham, as a witness. In her declaration filed with the writ petition, Cunningham declared that she spoke with defendant’s lawyer about a month before trial. She told her that after the robberies were committed, Cunningham found defendant’s backpack in her apartment and inside it found a BB gun. She was familiar with BB guns, had handled them at least twice previously, and knew the one in defendant’s backpack was a BB gun because she opened it and saw that only BB’s would fit in the chamber. She also told counsel that Brent had the box for the gun and the receipt, which showed a purchase date of November 12 or 22. When she

spoke to defendant's lawyer, counsel "did not want to bring up the gun issue." She never asked Cunningham to obtain the box or receipt nor did she call her to testify, although Cunningham had told her she was willing to do so.

Because we have already decided that the trial court should hold a hearing as to the competency of counsel, we need not make any determinations as to this second ground raised by defendant. It falls within our order.

#### DISPOSITION

The judgment is affirmed. As to the petition for writ of habeas corpus, we remand the matter to the trial court to issue an order to show cause and hold an evidentiary hearing and make a determination as to ineffective assistance of counsel as raised by the petition. This may include the ineffective assistance of counsel argument raised by the appeal as well.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

FYBEL, J.